

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOE FLORES, an individual; and
CONNIE FLORES, an individual,

Plaintiffs,

v.

EMERICH & FIKE, a professional
corporation, et al.

Defendants.

1:05-CV-0291 OWW DLB

ORDER GRANTING MOTION TO
STRIKE (DOC. 34) AND MOTION
TO DISMISS (DOC. 33/35).

I. INTRODUCTION

This is the third case filed by Joe and Connie Flores ("Plaintiffs") concerning a series of packing and marketing agreements entered into between Plaintiffs and DDJ, Inc., DDJ LLC, and related entities and individuals. DDJ, Inc., and DDJ LLC filed for Chapter 7 Bankruptcy Protection on January 3, 2005. Shortly thereafter, on March 1, 2005, Plaintiffs filed the instant complaint (*Flores III*), naming as defendants a number of individuals involved with DDJ and affiliated corporate entities (the "DDJ Defendants"). The *Flores III* complaint also names as defendants the law firm of Emerich & Fike and several individual attorneys at that firm (collectively, the "Fike Defendants") who represent many of the DDJ Defendants.

The Fike Defendants move to dismiss and/or strike all of the claims against them. Specifically, the Fike Defendants move to dismiss the eighth cause of action (civil RICO) and to strike the

1 second (malicious prosecution), third (abuse of process), fourth
2 (violation of the uniform fraudulent transfer act), seventh
3 (conversion), ninth (negligent interference with contract), tenth
4 (conspiracy), and eleventh (invasion of privacy/defamation)
5 causes of action.

6 7 **II. PROCEDURAL HISTORY**

8 Plaintiffs' filed their initial complaint against DDJ, Inc.,
9 DDJ LLC, and others in 1999, asserting claims under the
10 Perishable Agricultural Commodities Act ("PACA"), along with
11 state law contract and tort claims. *See Flores et al v. DDJ,*
12 *Inc., et al.*, 1:99-cv-5878 AWI DLB ("*Flores I*"). In 2003, a jury
13 found for the Flores' on all claims against DDJ Inc. and DDJ LLC
14 ("the Judgment Debtors").

15 On October 15, 2004, the Flores' filed a second lawsuit,
16 alleging that individual officers of the Judgment Debtors
17 fraudulently transferred assets from the Judgment Debtors into
18 their own names. *See In Re Joe Flores, et a. v. Dennis Hagobian,*
19 *et al.*, 1:04-cv-6405 OWW DLB ("*Flores II*").

20 On January 3, 2005, DDJ, Inc. and DDJ, LLC filed for Chapter
21 7 bankruptcy protection. Further proceedings in *Flores I* were
22 stayed pursuant to the automatic stay provision of the Bankruptcy
23 Code. *Flores I*, Doc. 408 at 2. Similarly, *Flores II* has been
24 stayed pending notice of whether the bankruptcy trustees will
25 authorize the case to proceed and whether the stay should be
26 lifted for that case. (*Flores II*, Doc. 19 at 3.)

27 Shortly after the bankruptcy filing, the Flores' filed the
28 141-page complaint in this case ("*Flores III*"). The third

1 complaint alleges various forms of alter ego liability,
2 fraudulent transfers, and the existence of a racketeering
3 enterprise. (Doc. 1 ("Compl."), filed Mar. 1, 2005.) *Flores III*
4 names as defendants many of the individual and corporate
5 defendants named in *Flores I* and *Flores II*, although the Judgment
6 Debtors (DDJ Inc. and DDJ LLC) are not named. The new complaint
7 names as defendants: Emerich & Fike, a law firm that represented
8 DDJ Inc. and DDJ LLC in *Flores I*, and a number of individual
9 lawyers who practice at Fike (the "Fike Defendants"). Plaintiffs
10 request damages, injunctive relief, and attorney's fees.

11 On May 10, 2005, counsel for DDJ Inc. and DDJ LLC filed a
12 "notice of filing bankruptcy" in this case, asserting that these
13 proceedings also are subject to the automatic stay because the
14 pending claims concern property belonging to the debtors' estate.
15 The district court determined that the automatic stay applied to
16 some of the defendants, but requested further briefing on the
17 applicability of the stay to the remaining defendants. (Doc.
18 72.)

19 The Chapter 7 Bankruptcy Trustee then submitted a report
20 indicating that the Trustee does not intend to pursue any of the
21 claims against the Fike Defendants and consented to an order
22 vacating the stay. The district court vacated the stay and set
23 the Fike Defendants' previously-filed motions to dismiss and to
24 strike for hearing.

25 Oral argument on these motions was heard December 12, 2005.
26 On February 3, 2006, the related adversary bankruptcy proceeding
27 in *Enoch Packing Inc., Joe Flores and Connie Flores v. DDJ Inc,*
28 *et al., James Salvan Trustee*, Case No. 02-17736-A-7, was

1 dismissed without leave to amend. (Docs 105 & 106.) The Flores'
2 moved for reconsideration before the bankruptcy court. (Doc.
3 107, dated Feb. 9, 2006.)

4
5 **III. FACTUAL BACKGROUND**

6 Joe and Connie Flores are apple growers based in Visalia,
7 California. In September 1995, the Flores' entered into a
8 packing and marketing agreement with Fruit Marketing, Inc. (FMI),
9 now known as DDJ Inc. During this relationship, FMI advanced the
10 Flores' money in exchange for a security interest in the Flores'
11 apple crops. The terms of the loan are set forth in a promissory
12 note signed by Joe Flores.

13 In or around early 1998, the Flores began to suspect that
14 FMI was using improper accounting practices to calculate the
15 amount due to the Flores' under the packing and marketing
16 contract. In April 1998, the Flores demanded access to all of
17 FMI's documents related to the handling and selling of the
18 Flores' 1997 and 1998 apple crops. Throughout the remainder of
19 1998, the parties disputed the extent to which the Flores' were
20 entitled to access these documents and whether the Flores would
21 need to pay \$0.53 per page for copies of the documents.

22 At some point in mid-1998, the Flores entered into a packing
23 and marketing agreement with a different fruit packer, Hemphill &
24 Wilson enterprises ("H&W"). On October 16, 1998, the Fike
25 Defendants, on behalf of their client FMI, sent a letter to H&W,
26 informing H&W that FMI had a secured interest in the proceeds
27 from the Flores' 1998 apple crop. On October 26, a
28 representative from H&W informed the Flores that H&W would not

1 perform the contract under such circumstances. On October 27,
2 the Fike Defendants sent a letter to the Flores' formally
3 demanding payment of the amount due under the note. Throughout
4 this entire period, the Flores' were still engaged in a dispute
5 with FMI, represented by the Fike Defendants, over how much the
6 Flores would pay to obtain copies of FMI's documents.

7 On April 27, 1999, an attorney filed a complaint on behalf
8 of the Flores, naming DDJ and related entities and individuals as
9 defendants. *Flores, et al., v. DDJ Inc., et al.*, 1:99-cv-5878.
10 Disputes over access to documents from FMI's files continued
11 throughout 1999 and 2000. Eventually, the Flores' received a
12 large number of documents from FMI. However, the Flores' now
13 assert that these documents had been "sanitized," by one of the
14 DDJ Defendants, Dennis Hagobian, who was seen "shredding
15 documents from sales jackets for many days." (See J. Flores
16 Decl. at ¶58.) The evidence of document destruction was known to
17 the Flores' during the Flores I trial.

18 On July 31, 1999, DDJ sold most of its property to Norman
19 Trainer and his partner Steven Taft ("Trainer and Taft"). Among
20 the assets transferred to Trainer and Taft was the Flores'
21 promissory note. As part of the transaction, DDJ and Trainer and
22 Taft entered into an agreement whereby DDJ agreed to defend
23 against the Flores' lawsuit and pursue the counterclaim on behalf
24 of Trainer and Taft.

25 The Fike Defendants filed a cross-complaint against the
26 Flores on behalf of DDJ, alleging breach of contract and seeking
27 payment on the promissory note. The Flores later challenged
28 DDJ's standing to bring the counterclaim on behalf of Trainer and

1 Taft. Judge Ishii allowed the claim to go forward.

2 A jury trial commenced in July 2003. On July 25, a jury
3 returned a special verdict, finding for plaintiffs on all causes
4 of action alleged against DDJ and finding for the Flores' on the
5 counterclaims. The jury determined that the Flores' were
6 entitled to damages.

7 On October 15, 2004, the Flores' filed a second lawsuit,
8 alleging that individual officers of the Judgment Debtors
9 fraudulently transferred assets from the Judgment Debtors into
10 their own names. See *In Re Joe Flores, et al. v. Dennis*
11 *Hagobian, et al.*, 1:04-cv-6405 ("Flores II").

12 On January 3, 2005, DDJ, Inc. and DDJ, LLC filed for Chapter
13 7 bankruptcy protection.

14
15 **IV. ALLEGATIONS IN FLORES III**

16 Plaintiffs' complaint, which is 142 pages long, presents the
17 following eleven "causes of action."¹

- 18 1. Alter ego liability. (Compl. at 26.)
- 19 2. Malicious prosecution. (*Id.* at 46.)
- 20 3. Malicious use of process, spoliation of evidence, and
21 fraudulent concealment of evidence. (*Id.* at 51.)
- 22 4. Violation of the Uniform Fraudulent Transfer Act [Civil
Code § 3439 et seq.]. (*Id.* at 60.)
- 23 5. Violation of 7 U.S.C. §§ 499(b)(1), (2) & (4); PACA §§
24 2(2) & (5); 21 U.S.C. §§ 331(a), (b), (c) & (k). (*Id.*
at 84.)
- 25 6. Fraud, Deceit, Intentional and Negligent Fraud, and
26 Constructive Fraud and Breach of Fiduciary Duty. (*Id.*

27 ¹ Many of these causes of action are subdivided into
28 numerous separate "claims."

at 86.)

7. Conversion. (*Id.* at 89.)

8. Civil Racketeering in violation of 18 U.S.C. § 1961.

9. Negligent interference with or procurement of a breach of contract. (*Id.* at 124.)

10. Conspiracy to defraud and commit various other offenses against Plaintiff's business interests. (*Id.* at 127.)

11. Invasion of privacy. (*Id.* at 132.)

Although the complaint in this case is detailed and very lengthy, only a few factual allegations are directed at the Fike Defendants. Specifically, the Complaint alleges that the Fike Defendants:

(1) Prosecuted the cross-complaint in *Flores I* without probable cause as to both Joe Flores and Connie Flores.

(2) Attempted to charge Joe Flores \$0.53 per page to copy documents prior to the commencement of litigation in *Flores I*.

(3) Sent correspondence to H&W, the Flores' new marketing agent, notifying H&W that FMI had a secured interest in the Flores' 1998 apple crop based on an outstanding debt allegedly owed to FMI by the Flores'.

(4) Failed to produce documents in discovery that Fike defendants later attempted to use at trial.

(5) Destroyed relevant documents (or at least conspired to destroy them).

(5) Maintained the underlying action in a manner to buy the DDJ Defendants additional time to defraud their creditors.

(6) The DDJ Defendants' alleged fraudulent transfers were

1 used to pay the Fike defendant's legal fees.

2 **V. STANDARD OF REVIEW**

3 **A. Motion to Strike.**

4 The Fike Defendants move to strike the second (malicious
5 prosecution), third (abuse of process), fourth (violation of the
6 uniform fraudulent transfer act), seventh (conversion), ninth
7 (negligent interference with contract), tenth (conspiracy), and
8 eleventh (invasion of privacy/defamation) causes of action under
9 California's "Anti-SLAPP" statute, California Code of Civil
10 Procedure Section 425.16, which provides in relevant part:

11 A cause of action against a person arising from
12 any act of that person in furtherance of the
13 person's right of petition or free speech under
14 the United States or California Constitution in
15 connection with a public issue shall be subject to
a special motion to strike, unless the court
determines that the plaintiff has established that
there is a probability that the plaintiff will
prevail on the claim.

16 ***

17 As used in this section, "act in furtherance of a
18 person's right of petition or free speech under
19 the United States or California Constitution in
connection with a public issue" includes:

20 (1) any written or oral statement or writing
made before a legislative, executive, or
21 judicial proceeding, or any other official
proceeding authorized by law;

22 (2) any written or oral statement or writing
made in connection with an issue under
23 consideration or review by a legislative,
24 executive, or judicial body, or any other
official proceeding authorized by law;

25 (3) any written or oral statement or writing
made in a place open to the public or a
26 public forum in connection with an issue of
public interest;

27 (4) or any other conduct in furtherance of
28 the exercise of the constitutional right of
petition or the constitutional right of free
speech in connection with a public issue or

1 an issue of public interest.

2 Cal. Code Civ. Pro. § 425.16(b)(1) & (e) (emphasis added).

3 A court considering a motion to strike under the anti-SLAPP
4 statute must engage in a two-part inquiry. First, a defendant
5 must make an initial *prima facie* showing that the plaintiff's
6 suit "aris[es] from" activity protected by the Anti-SLAPP
7 statute. *Brill Media Co. v. TCW Group, Inc.*, 132 Cal. App. 4th
8 324, 329 (2005); Cal. Code Civ. Pro. § 425.16(b)(1). In
9 performing this analysis, the California Supreme Court has
10 stressed, "the critical point is whether the plaintiff's cause of
11 action itself was *based on* an act in furtherance of the
12 defendant's right of petition or free speech." *City of Cotati v.*
13 *Cashman*, 29 Cal. 4th 69, 78 (2002) (emphasis in original).

14 If the defendant is able to make this threshold showing, the
15 burden shifts to the plaintiff to demonstrate a probability of
16 prevailing on the challenged claims. In practice, a plaintiff
17 must show that the claim is "both legally sufficient and
18 supported by a sufficient *prima facie* showing of facts to sustain
19 a favorable judgment if the evidence submitted by the plaintiff
20 is credited." *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th
21 728, 744 (2003). Claims for which Plaintiff is able to satisfy
22 this burden are "not subject to being stricken as a SLAPP." *Id.*

23
24 **B. Motion to Dismiss.**

25 The Fike Defendants move to dismiss the eighth cause of
26 action (civil RICO). Federal Rule of Civil Procedure 12(b)(6)
27 provides that a motion to dismiss may be made if the plaintiff
28 fails "to state a claim upon which relief can be granted."

1 However, motions to dismiss under Fed. R. Civ. P. 12(b)(6) are
2 disfavored and granted only where the claim is legally
3 insufficient. The question before the court is not whether the
4 plaintiff will ultimately prevail; rather, it is whether the
5 plaintiff could prove any set of facts in support of his claim
6 that would entitle him to relief. See *Hishon v. King & Spalding*,
7 467 U.S. 69, 73 (1984). "A complaint should not be dismissed
8 unless it appears beyond doubt that plaintiff can prove no set of
9 facts in support of his claim which would entitle him to relief."
10 *Van Buskirk v. CNN, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002)
11 (citations omitted).

12 In deciding whether to grant a motion to dismiss, the court
13 "accept[s] all factual allegations of the complaint as true and
14 draw[s] all reasonable inferences" in the light most favorable to
15 the nonmoving party. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th
16 Cir. 1999); see also *Rodriguez v. Panayiotou*, 314 F.3d 979, 983
17 (9th Cir. 2002). A court is not "required to accept as true
18 allegations that are merely conclusory, unwarranted deductions of
19 fact, or unreasonable inferences." *Sprewell v. Golden State*
20 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

21 22 VI. DISCUSSION

23 A. Motion to Strike the Second, Third, Fourth, Seventh, 24 Ninth, Tenth, and Eleventh Causes of Action as to the Fike Defendants.

25 The Fike Defendants advance a number of general arguments in
26 support of their motion to strike the Second, Third, Fourth,
27 Seventh, Ninth, Tenth, and Eleventh Causes of Action (all of
28 Plaintiff's state law causes of action against the Fike

1 Defendants). First, the Fike Defendants maintain that
2 California's Anti-SLAPP statute applies to all of these claims.
3 If the Anti-SLAPP statute applies, Plaintiffs are required to
4 establish a probability of prevailing on the covered claims by
5 setting forth facts that support a *prima facie* case.

6 The Fike Defendants maintain that Plaintiffs cannot
7 establish a *prima facie* case for any of the claims subject to the
8 motion to strike. Along with claim-specific arguments, the Fike
9 Defendants argue generally that (a) that California's Litigation
10 Privilege, Cal. Civ. Code § 47(b), bars all of Plaintiffs' state
11 law claims because the claims arise out of communications they
12 made as attorneys in the context of litigation; and (b) any state
13 law claims based upon a conspiracy theory are barred by
14 California Civil Code § 1714.10(a), which requires a plaintiff to
15 obtain a court order prior to filing a claim against an attorney
16 for civil conspiracy with his or her client.

17
18 **1. Legal Background.**

19 **a. California's Anti-SLAPP Statute.**

20 As discussed, a court considering a motion to strike under
21 the anti-SLAPP statute must engage in a two-part inquiry. First,
22 a defendant must make an initial *prima facie* showing that the
23 plaintiff's suit "aris[es] from" activity protected by the Anti-
24 SLAPP statute. *Brill Media*, 132 Cal. App. 4th at 329; Cal. Code
25 Civ. Proc. § 425.16(b)(1). A cause of action does not "arise
26 from" protected activity simply because it is filed after
27 protected activity took place. *Cashman*, 29 Cal. 4th at 76-77.
28 Nor does the fact "[t]hat a cause of action arguably may have

1 been triggered by protected activity" necessarily mean that it
2 arises from such activity. *Cashman*, 29 Cal. 4th at 78. The
3 trial court must instead focus on the substance of the
4 plaintiff's lawsuit in analyzing the first prong of a special
5 motion to strike. *Scott v. Metabolife Intern., Inc.*, 115 Cal.
6 App. 4th 404, 413-414 (2004); see also *Cashman*, 29 Cal. 4th at
7 78. In performing this analysis, the California Supreme Court
8 has stressed, "the critical point is whether the plaintiff's
9 cause of action itself was *based on* an act in furtherance of the
10 defendant's right of petition or free speech." *Cashman*, 29 Cal.
11 4th at 78 (emphasis in original). In other words, "the
12 defendant's act underlying the plaintiff's cause of action must
13 *itself* have been an act in furtherance of the right of petition
14 or free speech." *Id.*

15 If the defendant is able to make this threshold showing, the
16 burden shifts to the plaintiff to demonstrate a probability of
17 prevailing on the challenged claims. In practice, a plaintiff
18 must show that the claim is "both legally sufficient and
19 supported by a sufficient prima facie showing of facts to sustain
20 a favorable judgment if the evidence submitted by the plaintiff
21 is credited." *Jarrow*, 31 Cal. 4th at 738. Claims for which
22 Plaintiff is able to satisfy this burden are "not subject to
23 being stricken as a SLAPP."

24 **b. Plaintiffs' General Objections to the**
25 **Application of the Anti-SLAPP Statute.**

26 The Flores raise two general arguments, based on statutory
27 exemptions to the Anti-SLAPP law, in an attempt to establish that
28 the Anti-SLAPP provisions do not apply to any of their claims.

1 Section 425.17 exempts from Anti-SLAPP coverage certain public
2 interest lawsuits:

3 Section 425.16 does not apply to any action brought
4 solely in the public interest or on behalf of the
5 general public if all of the following conditions
6 exist:

7 (1) The plaintiff does not seek any relief greater
8 than or different from the relief sought for the
9 general public or a class of which the plaintiff
10 is a member. A claim for attorney's fees, costs,
11 or penalties does not constitute greater or
12 different relief for purposes of this subdivision.

13 (2) The action, if successful, would enforce an
14 important right affecting the public interest, and
15 would confer a significant benefit, whether
16 pecuniary or nonpecuniary, on the general public
17 or a large class of persons.

18 (3) Private enforcement is necessary and places a
19 disproportionate financial burden on the plaintiff
20 in relation to the plaintiff's stake in the
21 matter.

22 However, nowhere in the nine pages of Joe Flores' opposition
23 brief or their 142 page complaint is there any indication that
24 this lawsuit satisfies the conditions set forth in Section
25 425.17. In fact, the record suggests it is strictly a private
26 dispute. Plaintiffs here seek monetary damages for themselves
27 only. None of Plaintiff's claims purport to vindicate an
28 important right solely in the public interest or on behalf of the
general public. Plaintiffs have large, and very personal, stakes
in the outcome of this litigation. The section 425.17 exemption
does not apply.

Plaintiffs also argue that a second exemption, set forth in
§ 425.17(c) applies in this case. Section 425.17(c) provides:

Section 425.16 [the Anti-SLAPP provisions] do[] not
apply to any cause of action brought against a person
primarily engaged in the business of selling or leasing
goods or services, including, but not limited to,

1 insurance, securities, or financial instruments,
2 arising from any statement or conduct by that person if
both of the following conditions exist:

3 (1) The statement or conduct consists of
4 representations of fact about that person's or a
5 business competitor's business operations, goods,
6 or services, that is made for the purpose of
obtaining approval for, promoting, or securing
7 sales or leases of, or commercial transactions in,
the person's goods or services, or the statement
or conduct was made in the course of delivering
the person's goods or services.

8 (2) The intended audience is an actual or
9 potential buyer or customer, or a person likely to
repeat the statement to, or otherwise influence,
10 an actual or potential buyer or customer, or the
statement or conduct arose out of or within the
11 context of a regulatory approval process,
proceeding, or investigation, except where the
12 statement or conduct was made by a telephone
corporation in the course of a proceeding before
13 the California Public Utilities Commission and is
the subject of a lawsuit brought by a competitor,
14 notwithstanding that the conduct or statement
concerns an important public issue.

15 (emphasis added). Essentially, this provision exempts from the
16 Anti-SLAPP statute any statements or conduct made by a seller or
17 lessor of goods and services during the course of a commercial
18 transaction either to a potential buyer or customer. However,
19 the exemption only applies to causes of action brought against
20 "person[s] primarily engaged in the business of selling or
21 leasing goods or services...." The Fike Defendants, who are
22 attorneys, are not covered by the plain language of this
23 provision, even though, technically, as attorneys, they market
24 legal services to the public. Their alleged actions here do not
25 pertain to efforts to market their services nor were
26 representations made to potential consumers or to gain a
27 competitive advantage. This exception is also inapplicable.
28

c. California's Litigation Privilege.

California Civil Code § 47(b) provides in pertinent part.

A privileged publication or broadcast is one made:

- (a) In the proper discharge of an official duty.
- (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

- (1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

- (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

1 The most relevant portion of section 47 is subsection b, which
2 provides absolute privilege for any "publication or broadcast"
3 made in any judicial proceeding. California courts have given
4 this privilege an "expansive reach." *Rubin v. Green*, 4 Cal. 4th
5 1187, 1193-94 (1993). It extends to any communication that bears
6 "some relation to any ongoing or anticipated lawsuit." *Id.* at
7 1194. The privilege also applies to a wide range of causes of
8 action. The California Supreme Court noted "the only exception
9 to [the application of [section 47(b) to tort suits has been for
10 malicious prosecution." *Id.* The California courts have applied
11 the privilege to claims of abuse of process, *Pollock v. Univ. of*
12 *So. Cal.*, 112 Cal. App. 4th 1416 (2003), fraud, *Carden v.*
13 *Getzoff*, 190 Cal App. 3d 907 (1987), invasion of privacy, *Ribas*
14 *v. Clark*, 38 Cal. 3d 355, 364 (1985), and interference with
15 contract, *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.
16 3d 1118 (1990).

17 Critically, the privilege only applies to communicative
18 acts, not noncommunicative conduct. *Rubin v. Green*, 4 Cal. 4th
19 1187, 1195-96 (1993). For example, an attorney's act of
20 counseling his or her client is covered, even if it is alleged
21 that the attorney made misrepresentations during the course of
22 such communications. *Id.* However, pure conduct, such as
23 eavesdropping, is not covered. *Id.*

24 The Flores' raise one general objection to the application
25 of the litigation privilege. The Flores point to language in
26 section 47 that appears to limit the applicability of section 47
27 to certain types of communications only if those communications
28 are made "without malice," impliedly arguing that the Fike

1 Defendants' actions were made with malice and therefore should
2 not be covered by the privilege. (See J. Flores' Opp'n at 30).
3 But the "without malice" language, which is mentioned twice in
4 section 47, is inapplicable here. The phrase first occurs in an
5 exception to the litigation privilege for certain communications
6 made during the course of "marital dissolution or legal
7 separation." See Cal. Civ. Code

8 § 47(b)(1). It appears again in section 47(c), which provides:

9 A privileged publication or broadcast is one made:

10 (c) In a communication, without malice, to a person
11 interested therein, (1) by one who is also interested,
12 or (2) by one who stands in such a relation to the
13 person interested as to afford a reasonable ground for
supposing the motive for the communication to be
innocent, or (3) who is requested by the person
interested to give the information.

14 (emphasis added). Subsection (c) operates to protect against
15 liability for communications made outside the context of
16 litigation (i.e., statements that would not qualify for
17 protection under subsection (b)). The statute gives an example
18 of such a communication:

19 This subdivision applies to and includes a
20 communication concerning the job performance or
21 qualifications of an applicant for employment, based
22 upon credible evidence, made without malice, by a
current or former employer of the applicant to, and
upon request of, one whom the employer reasonably
believes is a prospective employer of the applicant.

23 Cal. Civ. Code § 47(c). With respect to communications falling
24 under the scope of subsection (c), the privilege only applies in
25 the absence of evidence of malice. However, Defendants do not
26 invoke this form of the privilege. Rather, they rely upon
27 subsection (b), at all times asserting the "litigation" privilege
28 only as it relates to communications made in the context of

1 pending or active litigation. The "without malice" language is
2 inapplicable here.

3
4 **2. Second Cause of Action for Malicious Prosecution.**

5 **a. Applicability of Anti-SLAPP Statute.**

6 Plaintiffs' second cause of action for malicious prosecution
7 alleges that the Fike Defendants prosecuted the cross-complaint
8 in *Flores I* without probable cause as to both Joe Flores and
9 Connie Flores. There is only one act underlying this claim --
10 the filing of a cross-complaint. The Anti-SLAPP statute
11 explicitly covers "any written or oral statement or writing made
12 before a...judicial proceeding." Cal. Code Civ. Pro.
13 § 425.16(e)(1);² *Jarrow*, 31 Cal. 4th 728.

14 In addition to the general arguments discussed above,
15 Plaintiffs raise several additional arguments against application
16 of the Anti-SLAPP statute to this claim. None of these arguments
17 have merit. First, Plaintiffs place great emphasis on the phrase
18 "public issue" contained in the introductory paragraph of the
19 Anti-SLAPP statute:

20 A cause of action against a person arising from any act
21 of that person in furtherance of the person's right of
22 petition or free speech under the United States or
23 California Constitution in connection with a public
issue shall be subject to a special motion to strike...

24 Cal. Code Civ. Proc. § 425.16(b)(1). The Flores argue that the
25 Fike Defendants' acts in filing the cross-complaint were not

26
27 ² Access to the court is a constitutional right founded
28 upon the First Amendment. *Cal. Motor Transport Co. v. Trucking*
Unlimited, 404 U.S. 508, 510-11 (1972).

1 undertaken in connection with a "public issue" and therefore are
2 not covered by the statute. Plaintiffs operate under a mistaken
3 understanding of the statute. Section 425.16(e) explicitly
4 defines the phrase "act in furtherance of a person's right of
5 petition or free speech under the United States or California
6 Constitution in connection with a public issue" to include "any
7 written or oral statement or writing made before a legislative,
8 executive, or judicial proceeding, or any other official
9 proceeding authorized by law." (emphasis added).

10 Plaintiffs again raise the commercial speech exception to
11 the Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.17(c). As
12 discussed above, the plain language of this provision makes it
13 inapplicable to the Fike Defendants who advanced claims for money
14 allegedly due their clients, not to market their services as
15 attorneys. Moreover, Mr. Flores' general discussion of
16 constitutional theory applicable to commercial speech is
17 misplaced. Nowhere does Mr. Flores explain or suggest why
18 general first amendment protections for categories of speech have
19 a bearing on whether the § 425.17(c) exception should be applied
20 in this case to these defendants.

21 Finally, Mr. Flores cites *Bertero v. National General*
22 *Corporation*, 13 Cal. 3d 43 (1972), an appeal of a jury verdict in
23 a malicious prosecution case. In *Bertero*, the court acknowledged
24 that a malicious prosecution case could be based upon the filing
25 of a cross-complaint without probable cause. However, as *Bertero*
26 was a post trial proceeding and was decided before the passage of
27 the Anti-Slapp law, it is not relevant to the current inquiry.

28 The Fike Defendants have satisfied the threshold burden of

1 establishing that the Anti-SLAPP statute applies to the malicious
2 prosecution claim. As attorneys, they asserted claims to recover
3 alleged unpaid loans from Plaintiffs on behalf of a client. To
4 advance such claims in court, a public forum, implicates FMI's
5 and the Fike defendants' right to assert claims in a public
6 forum, in the form of written statements made in a judicial
7 proceeding.

8
9 ***b. Applicability of the Litigation Privilege.***

10 The litigation privilege does not apply to claims of
11 malicious prosecution. Malicious prosecution actions are
12 permitted because "the policy of encouraging free access to the
13 courts is outweighed by the policy of affording redress for
14 individual wrongs when the requirements of favorable termination,
15 lack of probable cause, and malice are satisfied. *Silberg*, 50
16 Cal.3d at 216. This is perhaps the only exception to the
17 absolute nature of the litigation privilege. *Id.*; see also
18 *Rubin*, 4 Cal. 4th 1193-94.

19
20 ***c. Merits of the Malicious Prosecution Claim.***

21 Because Defendants have met their burden to prove the
22 applicability of the Anti-SLAPP statute, Plaintiff must then make
23 a "sufficient prima facie showing of facts to sustain a favorable
24 judgment if the evidence submitted by the plaintiff is credited."
25 The elements of a prima facie case of malicious prosecution are
26 (1) a judicial proceeding favorably terminated; (2) lack of
27 probable cause; and (3) malice. *Villa v. Cole*, 4 Cal. App. 4th
28 1327, 1335 (1992). Malicious prosecution actions are disfavored

1 under California law. *Sheldon Appel. Co. v. Albert & Oliker*, 47
2 Cal. 3d 863, 872 (1989) (tort of malicious prosecution "has
3 historically been carefully circumscribed so that litigants with
4 potentially valid claims will not be deterred from bringing their
5 claims to court by the prospect of a subsequent malicious
6 prosecution" action).

7 The first element is satisfied in this case because the
8 Flores' obtained a favorable jury verdict in *Flores I* and
9 defeated the defendants' cross-complaints. The Fike Defendants
10 maintain that Plaintiffs are unable to establish either lack of
11 probable cause or malice.

12
13 (1) Probable cause.

14 Here, Plaintiffs allege that the Fike Defendants prosecuted
15 the cross-complaint in *Flores I* without probable cause as to both
16 Joe and Connie Flores. The Flores' make a number of general
17 arguments in support of this contention, but none of these
18 arguments satisfy Plaintiffs' burden.

19 First, Joe Flores suggests that the absence of probable
20 cause is established because the jury found that the Flores' were
21 not liable under the cross-complainant. (J. Flores' Opp'n at
22 17.) This argument defies logic. The first element of a prima
23 facie case of malicious prosecution is a "judicial proceeding
24 favorably terminated." The jury's verdict satisfies the first
25 element, but Joe Flores suggests that the verdict also satisfies
26 the second element -- absence of probable cause. If this were
27 the case, the second element would be redundant and unnecessary.
28 A greater showing is needed to establish absence of probable

1 cause.

2 Probable Cause exists to file a claim whenever "any
3 reasonable attorney would have thought the claim tenable."
4 *Sheldon Appel.*, 47 Cal. 3d at 885. Litigants have the right to
5 present claims that are arguably correct, "even if it is
6 extremely unlikely that they will win." *Id.* at 885. Plaintiff
7 correctly points out that, even if a reasonable attorney might
8 believe in the merits of a claim, one cannot escape liability if
9 the action "was prosecuted with knowledge of the falsity of the
10 claim." *Albertson v. Raboff*, 46 Cal. 2d 375, 382; *Bertero*, 13
11 Cal. 3d at 55.

12 Turning then to the factual allegations contained within the
13 Complaint and the Flores' oppositions to this motion to strike,
14 the Flores' have not alleged facts to show absence of probable
15 cause or knowledge of the falsity of the claim. First, the
16 Flores' conclusorily allege that the Fike Defendants lacked
17 probable cause to believe that any debt was owed by the Flores'
18 at all under the promissory note. They do not allege facts
19 showing why or how the Fike defendants could then know the claims
20 were meritless. But, the Fike Defendants represent that they
21 reviewed the accounting records and concluded that these records
22 evidenced a \$9,843.66 debt to FMI. Although the jury in *Flores I*
23 ultimately found that the Flores did not owe DDJ, as assignee,
24 any money on the counterclaim, nothing in the record indicates
25 that the Fike Defendants knew at the time that the claim was
26 filed that the allegations in the counterclaim were false or that
27 the monetary claim was spurious. Nor is there any indication in
28 the record that no reasonable attorney would have believed the

1 counter-claim debt owed was unjustified. (Plaintiffs bear the
2 burden of establishing as much in this case, and cannot rely upon
3 the trial record from *Flores I* unless there are undisputed
4 judicially noticeable facts that exist.)

5 Second, the Flores' emphasize that, although Joe Flores
6 signed a promissory note to DDJ, DDJ later sold the note to a
7 third party, Taft & Trainer, Inc. The Fike Defendants
8 acknowledge that this transfer occurred, but maintain that DDJ
9 Inc. had an agreement with Taft & Trainer that DDJ would defend
10 the *Flores I* lawsuit and pursue any counterclaim for the Flores'
11 outstanding debt under the note. (Fike Decl. ¶16) The existence
12 of such an agreement was supported by written agreements. (*Id.*
13 at Exhibit 2.) Although the jury in *Flores I* ultimately found
14 that the Flores' did not owe money to either DDJ or Taft &
15 Turner, there is absolutely no indication that the indemnity,
16 assignment, and litigation enforcement agreement was invalid,
17 and, even if invalid, that the Fike Defendants knew of any
18 invalidity or that no reasonable attorney would have believed the
19 agreement to be valid.

20 Finally, Ms. Flores specifically alleges that the Fike
21 Defendants lacked probable cause to claim that she was a
22 signatory to the promissory note. Accordingly, Ms. Flores
23 alleges that there was no probable cause to name her as a
24 counter-defendant. Ms. Flores correctly points out that the
25 promissory note itself repeatedly refers to Mr. Flores and never
26 to Ms. Flores (or Connie Flores). For example, it declares that
27 "DDJ, Inc. holds a secured interest in certain apples and
28 proceeds belonging to Mr. Flores." However, the Fike Defendants

1 submit that both Joe and Connie Flores were responsible for the
2 promissory note because both were signatories to various
3 packaging and marketing agreements and that the promissory note
4 was entered into as part of an overall package of agreements.
5 (Fike Decl. ¶ 15.) Moreover, the promissory note itself states
6 that the note "is secured by the financing statement given to
7 lender from borrower pursuant to their Packing and Marketing
8 Agreement dated February 18, 1997." (See Promissory Note.)

9 The only relevant inquiry is whether the attorney's client
10 provides facts that establish the existence of probable cause for
11 the lawsuit's claims. The opposing party's competing evidence is
12 irrelevant

13 Plaintiffs and their attorneys are not required, on
14 penalty of tort liability, to attempt to predict how a
15 trier of fact will weigh competing evidence, or to
16 abandon their claim if they think it likely that
evidence will ultimately weigh against them. They have
a right to bring a claim they think unlikely to
succeed, so long as it is arguably meritorious.

17 *Wilson v. Parker Covert & Chidester*, 28 Cal. 4th at 822.

18 Plaintiffs offer no evidence suggesting that the Fike Defendants
19 had any reason to doubt the existence of probable cause to
20 believe that Ms. Flores was a proper counter-defendant.

21
22 (2) Malice.

23 To prove malice, Plaintiffs must show that the Fike
24 Defendants filed the underlying action with a wrongful motive.
25 *Centers v. Dollar Markets*, 99 Cal. App. 2d 534, 541 (1950).
26 Malice can be inferred from willful misconduct, see *Drum v.*
27 *Bleau, Fox & Assoc.*, 107 Cal. App. 4th 1009, 1020 (2003), but no
28 willful misconduct, such as the intent to vex or annoy, on the

1 part of the Fike Defendants is alleged in the complaint or
2 otherwise evident in the record. This omission is a fatal defect
3 in a malicious prosecution claim.

4 The Anti-Slapp law applies to Plaintiffs' second cause of
5 action. However, Plaintiffs have failed to establish that this
6 claim is "both legally sufficient and supported by a sufficient
7 prima facie showing of facts to sustain a favorable judgment if
8 the evidence submitted by the plaintiff is credited." *Jarrow*, 31
9 Cal. 4th at 738. The Fike Defendants' motion to strike the
10 second cause of action for malicious prosecution is **GRANTED, with**
11 **leave to amend.**

12
13 **3. Third Cause of Action for Abuse of Process.**

14 Plaintiff's third cause of action is entitled "malicious use
15 of process," but appears to be a claim for "abuse of process."
16 The tort of abuse of process constitutes "the use of a legal
17 process against another to accomplish a purpose for which it is
18 not designed." *Drum*, 107 Cal. App. 4th at 1019. Its elements
19 are: (1) "an ulterior motive;" and (2) "a willful act in the use
20 of process not proper in the regular conduct of the proceedings."
21 *Id.*

22 The essence of the tort 'abuse of process' lies in the
23 misuse of the power of the court; it is an act done in
24 the name of the court and under its authority for the
purpose of perpetrating an injustice....

25 Here, Plaintiffs allege that the Fike Defendants abused
26 legal process in several ways:

- 27 (1) By attempting to charge Joe Flores \$0.53 per page for
28 copying FMI's documents *before* the Flores filed suit;

(2) By sending correspondence to another packing agent, H&W, with an attached UCC-1 Financing Statement, notifying H&W that FMI had a secured interest in the Flores' 1998 apple crop based on an outstanding debt, thereby causing other packers to "blackball" the Flores';

(3) By failing to produce documents in discovery that the Fike Defendants later attempted to use at trial and by destroying (or somehow aiding or having knowledge of the destruction of) relevant documents that should have been preserved for discovery.

(Compl. ¶¶180, 182, 184, 189-192, 196.)

a. Applicability of the Anti-SLAPP Statute.

The Anti-SLAPP statute has been applied to abuse of process claims where the underlying act arises from the exercise of the right to petition the courts for redress. See *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1570 (2005) (reasoning that a cause of action for abuse of process is subject to the Anti-SLAPP statute because "it arises from the exercise of the right of petition.").

The important question is whether the underlying act constitutes an exercise of the right of petition and/or invokes the court process. It is not so clear whether the Fike Defendants' initial demand that Plaintiffs pay \$0.53 per page to copy DDJ documents was made in connection with the underlying lawsuit. In other words, it is not clear that Plaintiff's conduct invoked any "process" of the court or implicated the Fike Defendants' right to petition the courts. The dispute over copy

1 costs occurred before any lawsuit was filed. Nor is it clear
2 whether a lawsuit was anticipated at that time. The copy charge
3 complaint, if *not* connected with a lawsuit, cannot constitute
4 "abuse of process." Giving Plaintiffs the benefit of the doubt
5 on this point, even if Fike Defendants' attempt to collect \$0.53
6 per page for copying DDJ documents was made in anticipation of
7 litigation, the Anti-SLAPP statute would apply as the attempt to
8 collect copying costs is an incident of the litigation process by
9 which the Fike Defendants sought to defend DDJ before a court of
10 law. Moreover, the Flores, as prevailing parties, could have
11 sought to recover excessive copying costs through a cost bill or
12 otherwise addressed during the underlying lawsuit.

13 The Fike Defendants' mailing of the notice of secured
14 interest to H&M is more closely connected to the Fike Defendants'
15 right of petition. Communications made in anticipation of
16 litigation may be protected by both the Anti-SLAPP provision and
17 the litigation privilege. See *Briggs v. Eden Council for Hope &*
18 *Opportunity*, 19 Cal. 4th 1106, 1115 (1999) ("Just as
19 communications preparatory to or in anticipation of the bringing
20 of an action or other official proceeding are within the
21 protection of the litigation privilege of Civil Code section 47,
22 subdivision (b)....such statements are equally entitled to the
23 benefits of section 425.16."). The letter to H&M is a
24 communication made in anticipation of litigation. It
25 specifically puts another crop-lender/creditor that FMI/DDJ
26 expects H&W to "honor and recognize the prior secured interest
27 held by [FMI/DDC] in apple crops and proceeds otherwise belonging
28 to Mr. Flores. In the event that [H&W] distributes proceeds

1 without regard to the security interest of [FMI/DDJ] in those
2 proceeds, [FMI/DDJ] will exercise all remedies available to it
3 with respect to such conduct." (See Ex. B to Emerich Decl.
4 (emphasis added)). The mailing of this letter is an act
5 protected by the Anti-SLAPP statute, as it is a conventional
6 notice of the claim of a prior security interest in crops, which
7 endeavored to protect the priority of that security interest and
8 put the new lender on notice.

9 The allegations of discovery misconduct and the related
10 destruction of evidence are also acts that fall within the scope
11 of the Anti-SLAPP statute.

12 Defendants have met their burden of establishing that the
13 Anti-SLAPP statute should apply to this cause of action.

14
15 ***b. Applicability of the Litigation Privilege.***

16 Defendants assert generally that all of the acts which
17 underlie the abuse of process claim are subject to the litigation
18 privilege. As discussed above, the letter to H&M is a
19 communication sent in anticipation of litigation to protect a
20 claimed security interest, which naturally falls within the
21 coverage of the litigation privilege. The applicability of the
22 privilege to the other alleged acts is not so clear-cut. On the
23 one hand, the attempt to charge the Flores' \$0.53 per page for
24 copies is communicative, and arguably conduct: the act of
25 demanding payment for copies. Similarly, the Fike Defendants
26 alleged attempt to use documents at trial that were not produced
27 at discovery and the Fike Defendants alleged involvement in the
28 destruction of evidence is arguably conduct, not communication.

1 However, such matters are inherently part of the discovery
2 process and were redressible under discovery rules and should
3 have been addressed during the underlying litigation.

4 Arguendo, even if the litigation privilege does not
5 absolutely bar this claim, the conduct is not sufficiently
6 described and not for a purpose the law intends to constitute
7 abuse of process as opposed to alleged discovery abuse.

8
9 ***c. Merits of the Abuse of Process Claim.***

10 Even if the litigation privilege does not apply, because the
11 Anti-SLAPP statute applies to all of the alleged acts underlying
12 Plaintiff's abuse of process claim, Plaintiffs must establish a
13 possibility of prevailing on an abuse of process claim based upon
14 these facts. In other words, do these factual allegations set
15 forth a prima facie claim of abuse of process. The elements of
16 an abuse of process claim are: (1) "an ulterior motive;" and (2)
17 "a willful act in the use of process not proper in the regular
18 conduct of the proceedings."

19 The ulterior motive element can be inferred from proof of a
20 willful improper act, *Drum*, 107 Cal. App. 4th, at 1020, so the
21 critical question is whether Plaintiffs have established a
22 "willful act in the use of process not proper in the regular
23 conduct of the proceedings."

24 Put another way, to abuse process, a defendant must use
25 court process for a purpose not intended, such as to obtain a
26 collateral advantage. Plaintiffs' allegations are confusing, but
27 it can be inferred from Plaintiffs' submissions that in early
28 1998, the Flores began to suspect that DDJ was using

1 inappropriate accounting practices to calculate the amount of
2 moneys owed to the Flores' for several years worth of apple
3 crops. The Flores began to demand access to DDJ's accounting
4 records but were never satisfied with the manner and scope of
5 access granted to those documents. The specific allegation of
6 the Complaint is that costs were wrongfully demanded for copying
7 these documents. The Flores believed they were entitled to
8 copies of accounting for their crops, without having to pay for
9 them. They allege that the Fike Defendants and DDJ believed (at
10 least at the time) that defendants were entitled to be reimbursed
11 for the costs of copying the documents. It also appears that the
12 Flores' and the Fike Defendants had numerous disagreements as to
13 the time, manner, and method of access to the accounting
14 documents.

15 Eventually, the Flores' turned to the Marketing Enforcement
16 Branch of the California Department of Food & Agriculture ("MEB")
17 to assist in resolving the disputes over access to the documents.
18 Individuals at MEB appear to have corresponded with the Fike
19 Defendants to direct the Fike Defendants' attention to applicable
20 regulations. These regulations required DDJ to afford the
21 Flores' access to documents concerning the marketing of their
22 fruit. This and other correspondence eventually resulted in an
23 agreement that the Fike Defendants and DDJ would provide the
24 Flores with copies of certain files. **Critically, however,**
25 **nowhere in the complaint is it alleged that it was improper for**
26 **the Fike Defendants to demand reimbursement for the costs of**
27 **copying documents for the Flores.** Nor could it be. (It is also
28 worth noting that the Fike Defendants ended up not charging the

1 Flores' \$0.53 per page.) Plaintiffs have made no allegation that
2 the demand for copy cost reimbursement was "a willful act in the
3 use of process not proper in the regular conduct of the
4 proceedings." Moreover, the issue could and should have been
5 redressed at the underlying trial.

6 Even if the notice of secured interest sent to H&W was not a
7 communication protected by the litigation privilege, the mailing
8 of that notice which was a normal step a secured party takes to
9 protect priority of a security interest and was not an abuse of
10 process. Nothing submitted demonstrates that the Fike Defendants
11 lacked probable cause to believe that the Flores' actually owed
12 money to FMI/DDJ pursuant to the promissory note and that a filed
13 financing statement reflecting a security interest in the Flores'
14 crops had been granted and perfected. Sending notice of the
15 second promissory note debt for crop loans along with a warning
16 that FMI/DDJ would take steps to protect its security interest
17 was a commercially reasonable and permissible action, unless
18 Plaintiffs can allege contrary facts.

19 Although the Fike Defendants acknowledge that there were
20 numerous discovery disputes during the *Flores I* litigation,
21 nothing in the record indicates that the Fike Defendants engaged
22 in "a willful act in the use of process not proper in the regular
23 conduct of the proceedings." In the hundreds of pages of
24 submissions from the Flores regarding the instant motions, the
25 alleged discovery violations are mentioned only a few times.
26 Specifically, Joe Flores' declaration, at paragraphs 60 and 61,
27 states:
28

1 On January 14, 2003, after Fike, on numerous
2 occasions declaring that there were no more documents
3 in their care, custody or control, suddenly by Court
Order, manages to find numerous documents previously
requested which he denied existed. [citations]

4 Accordingly, it is well documented and further
5 evidenced that Defendants, David R. Emerich, Esq., and
6 David A. Fike, Esq., knew or should have known they
7 were abusing the process since inception of this
matter, which commenced on April 29, 1999 [citation],
and continued on through pre-trial discovery by the
spoilation and concealment of evidence...

8 These conclusory allegations are insufficient to establish
9 that the Fike Defendants willfully used "process not proper in
10 the regular conduct of the proceedings." At most, they suggest a
11 violation of civil discovery rules. Such a violation, on its
12 own, does not constitute an abuse of process. Moreover, there
13 were adequate remedies to enforce the discovery rules in the
14 prior case. It is impermissible to sue for prior violations of
15 discovery rules in a subsequent lawsuit. There are any number of
16 legitimate (i.e., not improper) reasons why documents initially
17 not disclosed might later be provided in discovery. This is the
18 nature of civil litigation.

19 The Fike Defendants' motion to strike the third cause of
20 action is **GRANTED**.

21
22 **4. Fourth Cause of Action for Violation of the**
23 **Uniform Fraudulent Transfer Act ("UFTA").**

24 Plaintiff alleges that various defendants engaged in
25 unlawful transfers in violation of the Uniform Fraudulent
26 Transfers Act (UFTA). The complaint sets forth the dates,
27 amounts, and parties involved in each allegedly fraudulent
28 transfer. **Critically, however, the Fike Defendants are not**

1 mentioned in any of these specific fraudulent transfer
2 allegations. Rather, the UFTA allegation only relates to the
3 Fike defendants in two ways. First, Plaintiffs allege that the
4 Fike Defendants' activities bought time for the other defendants
5 to plan and execute the fraudulent transfers:

6 [T]he malicious prosecution as alleged in the SECOND
7 CAUSE OF ACTION, the malicious abuse of process as
8 alleged in the THIRD CAUSE OF ACTION, [the statutory
9 violations] as alleged in the EIGHTH CAUSE OF ACTION,
10 and Conspiracy to Defraud, to Interfere with the
11 Business Relationship, to Unlawfully Injure a Business,
12 to Destroy a Business, and to Defraud a Creditor...as
13 alleged in the TENTH CAUSE OF ACTION...**played a major
14 contributing factor in allotting time for the planning
of the actual fraudulent transfer of proceeds** belonging
to ALTER EGO DDJ, INC. and ALTER EGO DDJ, LLC by [the
Fike Defendants] with the actual intent to hinder,
delay or defraud some or all of ALTER EGO DDJ, INC. and
ALTER EGO DDJ, LLC's then and future creditors
including and principally Plaintiffs in connection with
the collection of their claims.

15 (Compl. at 71.) This passage arguably suggests that the Fike
16 Defendants contributed to "allotting time" for the fraudulent
17 transfers by defending against the *Flores I* lawsuit, filing the
18 counter-claim, and taking various other steps to protect its
19 clients interests. Second, Plaintiffs suggest that the Fike
20 Defendants are liable in fraud for accepting payment from DDJ for
21 services rendered.

22
23 **a. Applicability of the Anti-SLAPP Statute.**

24 The alleged acts are all related to the Fike Defendants'
25 right to petition the courts to represent clients as attorneys
26 and are therefore covered by the Anti-SLAPP statute.

1 **b. Applicability of the Litigation Privilege.**

2 The Fike Defendants maintain that the acts alleged in this
3 cause of action are protected by the litigation privilege as
4 well. However, it is difficult to determine the applicability of
5 the privilege because neither the complaint or any subsequent
6 filing explains the exact nature of the Fike Defendants' conduct
7 that allegedly contributed to "allotting time" for the other
8 defendants to engage in fraudulent transfers. There is not even
9 conduct alleged that constitutes a fraudulent conveyance. The
10 parties are not required to guess as to the basis of the claims.
11 As a general matter, each party to litigation is entitled to have
12 legal representation of its choice.

13
14 **c. Merits of the Uniform Fraudulent Transfer Act**
15 **Claim.**

16 Again, even if the litigation privilege is inapplicable,
17 because the Anti-Slapp statute applies, the Flores must establish
18 that this claim is "both legally sufficient and supported by a
19 sufficient prima facie showing of facts to sustain a favorable
20 judgment if the evidence submitted by the plaintiff is credited."
21 *Jarrow*, 31 Cal. 4th at 738.

22 A transfer of assets made by a debtor is fraudulent as to a
23 creditor if the transfer was made with an actual intent to
24 defraud any creditor, or was made without receiving reasonably
25 equivalent value. Cal. Civil Code § 3439.04; *Reddy v. Gonzales*,
26 8 Cal. App. 4th 188, 122-23 (1992).

27 First, Plaintiffs assertion that the Fike Defendants'
28 committed fraud by accepting payment for services rendered is not

1 legally cognizable.

2 An encumbrance by a debtor to an attorney, made for
3 value in the form of an antecedent obligation for legal
4 services, is not fraudulent as to another creditor,
5 under applicable provisions of the Uniform Fraudulent
6 Transfer Act, and this is true even though the transfer
7 was a preference that resulted in the debtor being
8 unable to satisfy debts of other creditors.

9 *Wyzard v. Goller*, 23 Cal. App 4th 1183, 1185 (1994).

10 Second, an allegation that the Fike Defendants intentionally
11 worked to "allot time" for the other defendants to engage in
12 fraudulent transfers is legally unintelligible. Plaintiffs have
13 submitted correspondence from the Fike Defendants to Plaintiffs
14 and others, which is covered by the litigation privilege. No
15 facts are alleged as to how the Fike Defendants engaged in any
16 conduct that helped allot time for the other defendants to engage
17 in fraud, or that the Fike Defendants engaged in any improper
18 conduct or had any knowledge or intent to defraud. Conclusory
19 allegations do not substitute for necessary facts to maintain a
20 claim, particularly in the face of an Anti-Slapp motion to
21 strike.

22 The Fike Defendants' motion to strike the fourth cause of
23 action is **GRANTED**.

24
25
26 **5. The Seventh Cause of Action for Conversion and
27 Conspiracy to Convert.**

28 Plaintiffs allege that many of the individual and corporate
defendants committed a number of acts of conversion. As with the
UFTA claim above, Plaintiffs assert that the Fike Defendants
aided the other defendants' acts of conversion, by "conspiring,
participating, and aiding and abetting by and through their

1 actions as attorney(s) of record for Defendants... [the]
2 successful...unlawful practice of conversion by means of []
3 fraudulent transfers...." (Compl. ¶342.) These conclusory
4 allegations have no legal significance. It is not alleged that
5 the Fike Defendants independently converted the Flores' property,
6 only that they conspired to do so. This is not a legally
7 cognizable claim.

8 In California, Civil Code § 1714.10 requires a plaintiff to
9 obtain a court order prior to filing any claim premised upon an
10 attorney's conspiracy with a client:

11 No cause of action against an attorney for a civil
12 conspiracy with his or her client arising from any
13 attempt to contest or compromise a claim or dispute,
14 and which is based upon the attorney's representation
15 of the client, shall be included in a complaint or
16 other pleading unless the court enters an order
allowing the pleading that includes the claim for civil
conspiracy to be filed after the court determines that
the party seeking to file the pleading has established
that there is a reasonable probability that the party
will prevail in the action.

17 §1714.10(a) (emphasis added). Failure to seek such an order is a
18 complete defense to the filing of any action for civil
19 conspiracy, and may form the basis of a motion to strike.
20 § 1714.10(b).

21 The allegation in this cause of action falls squarely within
22 the coverage of this provision and Plaintiffs did not obtain a
23 court order prior to filing this claim.

24 The Flores' rejoin by pointing to language in § 1714.10(c)
25 which carves out an exception for an attorney's acts which "go
26 beyond the performance of a professional duty to serve the client
27 and involve a conspiracy to violate a legal duty in furtherance
28 of the attorney's financial gain." (See J. Flores' Opp'n at 22.)

1 However, the complaint fails to allege the existence of acts that
2 go beyond the performance of a professional duty and/or that
3 violate a legal duty in furtherance of the Fike Defendants' own
4 financial interests.

5 The Fike Defendants' motion to strike the seventh cause of
6 action is **GRANTED**.

7
8 **6. Ninth Cause of Action for Negligent Interference**
9 **With or Procurement of a Breach of Contract.**

10 Plaintiffs' negligent interference with contract claim
11 alleges that the Fike Defendants negligently sent a copy of the
12 Flores' "financial statement" to H&W.³ As a result, Plaintiffs'
13 assert that they lost their contract with H&W. As discussed
14 above, the sending of the notice of a security interest to H&W
15 was an act taken in anticipation of litigation which is protected
16 by both the Anti-SLAPP statute and the litigation privilege. The
17 litigation privilege operates as an absolute bar to tort
18 liability. Accordingly, the Fike Defendants' motion to strike
19 this cause of action from the complaint is **GRANTED**.

20
21 **7. Tenth Cause of Action for Conspiracy to Defraud.**

22 Plaintiffs' tenth cause of action alleges that the Fike
23 Defendants conspired with other individual defendants (1) to
24 cover up unlawful activities by filing a counterclaim against
25 Plaintiffs in *Flores I*; and (2) to interfere with Plaintiffs'
26 contractual business relationship with another fruit packing

27 ³ As discussed, this was not a "financial statement" it
28 was a standard-form UCC notice of secured interest.

1 company. Specifically, the complaint also alleges that Emerich &
2 Fike were paid more than \$100,000.00 in attorneys fees to
3 accomplish many of the allegedly "questionable business
4 transactions" described in the complaint. (Compl. at 510.) In
5 response, the Fike Defendants assert that they received only
6 \$10,000 from their clients, with the remaining balance being paid
7 out by the clients' insurer, Fireman's Fund. (See David Fike
8 Decl. at ¶8, Doc. 34).

9 As discussed above, California Civil Code § 1714 operates to
10 bar this cause of action completely, because Plaintiffs failed to
11 obtain a court order prior to filing this conspiracy claim. The
12 Fike Defendants' motion to strike the tenth cause of action is
13 **GRANTED.**

14
15 **8. Eleventh Cause of Action for Invasion of Privacy/
16 Defamation.**

17 Plaintiffs' eleventh cause of action for invasion of privacy
18 alleges that the Fike Defendants sent a copy of the Flores'
19 "financial statement" to H&W. Plaintiffs allege that this
20 constituted an invasion of privacy and defamation. As with the
21 negligent interference with contract claim, the sending of the
22 notice of secured interest to H&W was an act taken in
23 anticipation of litigation which is protected by both the Anti-
24 SLAPP statute and the litigation privilege. The litigation
25 privilege operates as an absolute bar to tort liability.
26 Accordingly, the Fike Defendants' motion to strike the eleventh
27 cause of action is **GRANTED.**
28

1 **B. Motion to Dismiss the Eighth Cause of action for Civil**
2 **Racketeering in violation of 18 U.S.C. § 1961.**

3 Defendants move separately to dismiss the eighth cause of
4 action (Civil Racketeering). Plaintiffs allege generally that
5 the "Defendants" engaged in Racketeering to further the general
6 goal of misappropriating funds belonging to the bankruptcy
7 estate. Specifically, the complaint alleges that one of the DDJ
8 Defendants committed mail fraud by mailing allegedly fraudulent
9 documents prepared by one of the other DDJ defendants. As to the
10 Fike Defendants, the complaint alleges generally that the Fike
11 Defendants committed wire fraud by faxing allegedly false
12 documents to Plaintiffs during discovery in *Flores I.* (Compl. at
13 ¶336.) Plaintiffs also conclusorily describe the allegedly false
14 document. (Compl. at ¶389.)

15 A civil RICO complaint must at least allege: "(1) conduct
16 (2) of an enterprise (3) through a pattern (4) of racketeering
17 activity (known as 'predicate acts') (5) causing injury to
18 plaintiff's 'business or property.'" *Living Designs, Inc. v.*
19 *E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005)
20 Here, Plaintiffs allege that the Fike Defendants violated
21 sections 1962(c) (conducting the affairs of a racketeering
22 enterprise) and (d) (conspiring to commit racketeering). The
23 racketeering enterprise must exist independently from the acts of
24 racketeering. *Chang v. Chen*, 80 F.3d 1293, 1298-99 (9th Cir.
25 1996). Assumedly, Plaintiffs claim the law firm is a
26 racketeering enterprise, although they have not so alleged.

27 Section 1961 enumerates acts which are considered to be
28 "racketeering activity" (i.e., "predicate acts"). Included is
 "any act or threat involving murder, kidnapping, gambling, arson,

1 robbery, bribery, extortion, dealing in obscene matter, or
2 dealing in a controlled substance or listed chemical (as defined
3 in Section 102 of the Controlled Substances Act), which is
4 chargeable under State Law and punishable by imprisonment for
5 more than one year." § 1961(1)(A). Also included are any of
6 more than twenty types of conduct indictable under enumerated
7 provisions of the United States Code, ranging from mail fraud and
8 wire fraud, through robbery and extortion, to white slave trade.
9 § 1961(1)(B). Finally, a "predicate act" may also be established
10 by any offense involving fraud "connected with" a bankruptcy
11 case, "fraud in the sale of securities," or any act related to a
12 controlled substance or listed chemical "punishable" under
13 federal law." § 1961(1)(C).

14 Plaintiffs have failed to adequately allege facts that show
15 the Fike Defendants committed a predicate act. Here, Plaintiffs
16 conclusorily allege that the Fike Defendants engaged in a
17 laundry-list of purported predicate acts: Theft From Interstate
18 Shipments (18 U.S.C. 659); Mail Fraud (1341); Wire Fraud (1342);
19 Interstate and Foreign Travel to Aid in Racketeering Enterprise
20 (1952); Laundering of Monetary Instruments (1956); Engaging in
21 Monetary Transactions in Property Derived from Specified Unlawful
22 Activity (1957) and Trafficking in Counterfeit Goods (2320).
23 (Compl. at ¶362, 367). However, Plaintiffs only mention the Fike
24 Defendants in the context of Mail Fraud, Wire Fraud, and Engaging
25 in Monetary Transactions in Property Derived From Specified
26 Unlawful Activity.

27 As a threshold matter, Federal Rule of Civil Procedure 9(b)
28 applies to RICO Fraud allegations, including Mail Fraud and Wire

1 Fraud. *Moore v. Kayport Package Express, Inc.*, 855 F.2d 531, 541
2 (9th Cir. 1989). Rule 9(b) requires that the pleader state the
3 "time, place, and specific content of the false representations,
4 as well as the identities of the parties to the
5 misrepresentation." Plaintiffs have not met this standard here
6 and the Mail Fraud and Wire Fraud claims must be dismissed.

7 As to the allegation that the Fike Defendants engaged in
8 Monetary Transactions in Property Derived From Specified Unlawful
9 Activity, Plaintiffs have not properly pled such a claim against
10 the Fike Defendants. The elements of such a claim are: (1) the
11 defendant engaged or attempted to engage, (2) in a monetary
12 transaction, (3) in criminally derived property that is of value
13 greater than \$10,000.00, (4) knowing that the property is derived
14 from unlawful activity, and (5) that the property is in fact
15 derived from specified unlawful activity. Here, Plaintiffs
16 allege that the Fike Defendants received payment for services
17 rendered as counsel to the DDJ Defendants. Wholly absent from
18 the complaint is any allegation that such payments were illegal
19 or represented the proceeds of unlawful activity; or that the
20 Fike Defendants knew this money was derived from unlawful
21 activity. This cannot serve as a predicate offense under the
22 RICO statute.

23 Moreover, even if Plaintiffs had alleged the commission of a
24 predicate act, Plaintiffs have in no way alleged that the Fike
25 Defendants violated 1962(c) by conducting the affairs of a
26 racketeering enterprise that was independent of the racketeering
27 acts. *Chang*, 80 F.3d at 1298-99. To "conduct or participate
28 directly or indirectly in the conduct of such [an] enterprise [],
one must participate in the operation or management of the

1 enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 185
2 (1993) (finding that accounting firm could not be liable under
3 1962(c) merely by being associated with the enterprise). See
4 also *Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993) (finding that a
5 defendant attorney was not liable under 1962c even though he took
6 numerous steps to perpetuate the alleged fraud, including the
7 preparation of two letters designed to forestall and cover up the
8 fraud). Plaintiffs have not alleged that the Fike Defendants
9 participated in the management of DDJ.

10 Plaintiffs also allege that the Fike Defendants conspired to
11 violate RICO under 18 U.S.C. 1962(d). But, that provision
12 provides that "it shall be unlawful for any person to conspire to
13 violate any of the provisions of subsection (a), (b) or (c) of
14 this section." There can be no RICO conspiracy without having
15 committed a RICO violation. Here, Plaintiffs' allegations under
16 1962(c) are insufficient, and their allegation under 1962(d)
17 fails as well.

18 Defendants' motion to dismiss the eighth cause of action is
19 **GRANTED WITHOUT PREJUDICE.**

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VII. CONCLUSION

The Fike Defendants' motions to strike and to dismiss are **GRANTED** in their entirety. Any amended complaint shall be filed within fifteen (15) days following service of this decision by the Clerk of Court.

Dated: February 21, 2006

/s/ OLIVER W. WANGER

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE